

Towards a Repository of Policy Options for IIA Reform

Meeting

The Transformation of the International Investment Agreement Regime - The African Experience¹

Roundtable at the University of Lausanne, 19 February 2015, Lausanne Switzerland

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The Roundtable on “The Transformation of the International Investment Agreement Regime: The African Experience” took place on 19 February 2015 within the Swiss National Science Foundation (FNS) programme jointly run by the Universities of Lausanne and Geneva.

Participants discussed the evolution of bilateral and multilateral investment treaties concluded between and by African States, individually or within the framework of sub-regional organisations such as COMESA, SADC, EAC and ECOWAS.

With regard to bilateral investment treaties (BITs), the discussion confirmed the patchy and fragmented network of BITs concluded between African States and between African States and third States. A peculiar feature of African BITs is the particularly high percentage of treaties which have been signed but have not entered into force yet (approx 45 %). Recent practice also shows a growing disaffection of African States with BITs, with only 7 BITs entering into force in the period 2012-2014. Recent BITs, such as the BIT between Japan and Mozambique or between Canada and Benin), are more sophisticated and strike a better balance between the different private and public interests at stake.

Participants discussed at length **the need for African States to conclude BITs**, keeping in mind that there is **no compelling evidence of the direct link between these treaties and economic growth**. Participants agreed that States should be cautious about the conclusion of these treaties and carefully assess, on a case-by-case basis, their potential impact upon the sustainable development of their economies. From this perspective, participants noted a need to raise awareness on all **implications of these treaties and for capacity building, especially with regard to the provisions on policy space, the protection of sustainable development, and the settlement of disputes**.

Participants considered that the **review of BITs policy and practice** recently undertaken by South Africa was a healthy exercise. **African States should consider not only renegotiating the BIT already in force, especially those concluded decades ago which are clearly obsolete, but also alternative legal instruments for the promotion and protection of foreign investment**. There was general agreement that domestic legislation (especially at the constitutional level) may provide an attractive and adequate protection to foreign investors. Some participants emphasised the **importance of State contracts** as in this case the State could better foresee the potential impact of every single investment project. Other participants pointed out the lack of transparency and public scrutiny which often characterises State contracts.

¹ The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

With regard to multilateral treaties, participants noted that African sub-regional organizations have been particularly active in the negotiation and adoption of new legal instruments on the protection and promotion of foreign investment. In this respect, the link between trade and investment is more and more solid as demonstrated by the conclusion of several Free Trade Agreements containing investment provisions, as well as the recent practice on Economic Partnership Agreements between the European Union and African States or sub-regional organizations.

Participants also discussed several substantive and procedural provisions contained in investment-related treaties elaborated by sub-regional organizations such as SADC, ECOWAS and EAC.

They appreciated the innovative character of some of these provisions and in particular the fact that they have introduced obligations also for foreign investors and the home States. Agreements like the ECOWAS Supplementary Act, in particular, offer concrete answers to the main concerns raised with regard to foreign investment in general, including (a) the inadequate safeguards for the policy space of the host State, especially with regard to the protection of the environment, human rights and public health; (b) the lack of transparency and public scrutiny; (c) the responsibility and liability of multinational companies; and (d) the shortcomings of the current settlement of disputes mechanisms.

Participants also reflected on the **extent to which these innovative provisions could be tabled in future negotiations and ultimately be acceptable for third States or regional organizations alike.**

ⁱ The Roundtable included the participation of H.E. Xavier Carim, Ambassador South Africa, Permanent Mission Geneva; Makane Mbengue, University of Geneva; Eric de Brabandere, University of Leiden; Stephen Gelb, WTI – University of Bern; Pauline Mcharo, Graduate Institute Geneva; Tarcisio Gazzini, University of Lausanne.